TIARASETIA SDN BHD

v.

YAYASAN SELANGOR & ANOR

HIGH COURT MALAYA, SHAH ALAM
ZALEHA YUSOF JC
[CIVIL SUIT NO: MT4-22-729-1999]
9 DECEMBER 2009

CONTRACT: *Breach - Discharge by breach - Repudiation of Contract - Contract for plaintiff to develop land - Failure of plaintiff to fulfil its obligation - Plaintiff not having ability, resources or licence to carry out development - Plaintiff disabling itself from fulfilling contract terms - Whether amounted to repudiation by plaintiff - Whether defendant justified in terminating contract*

TORT: *Conspiracy - Conspiracy to injure - 1st defendant terminating contract with plaintiff and entering into contract with 2nd defendant - Whether defendants committed unlawful act to cause loss to plaintiff - Whether injury to plaintiff proven - Whether conspiracy established*

TORT: *Unlawful interference with trade - Whether 2nd defendant wrongfully induced 1st defendant to breach agreement with plaintiff - Whether unlawful interference established*

The first defendant was the registered owner of a piece of land known as Lot 2450. Lot 2450 was divided into 6 parcels - Parcels A, B, C, D, E and F. On 7 March 1995, the first defendant entered into a joint venture agreement with the plaintiff to develop Lot 2450 ("the 1st agreement"). The terms of the 1st agreement, *inter alia*, were: (a) that the plaintiff would develop Lot 2450 into a mixed development comprising apartments, shop houses/offices and condominium ("the development"); and (b) that the plaintiff was to construct a college valued at RM26 million on Parcel F. Pursuant to the first agreement, the first defendant granted a power of attorney (PA) in favour of the plaintiff. On 1 November 1996, the plaintiff pursuant to an agreement ("the 2nd agreement") appointed Double Acres Sdn Bhd (DASB) as contractor to carry out the development. Subsequently, by an agreement dated 10 April 1997 and a supplemental agreement dated 27 November 1998 ("the third agreements"), DASB entered into a joint venture with the second

defendant to develop Parcel C. Pursuant to the third agreements, the second defendant obtained a credit facility from MBF Finance for the sum of RM68 million ("the MBF Loan") which was securitized by a charge over Parcel C. In early 1999, a dispute arose between the plaintiff, DASB and the second defendant with regard to the MBF Loan which resulted in the termination of the second agreement on 26 January 1999 given certain breaches by DASB. On 25 February 1999, the third agreements between the second defendant and DASB were terminated by the second defendant. Then by a letter dated 19 April 1999, the first defendant terminated the first agreement for 16 alleged breaches committed by the plaintiff and revoked the PA. Subsequently, by an agreement dated 20 April 1999, the first defendant entered into a joint venture agreement with the second defendant to develop Parcel C ("the fourth agreement"). The plaintiff claimed that the first defendant had wrongfully terminated the first agreement and then conspired with the second defendant to injure the plaintiff when the first and second defendants entered into the fourth agreement and that the second defendant had wrongfully induced the first defendant to breach its agreement with the plaintiff. The plaintiff sought a declaration that the first agreement was still valid and for specific performance of the same, an account of monies received by the first defendant and damages. The first defendant counterclaimed for a declaration that the first agreement was terminated and damages. The issues to be determined were: (a) whether the first defendant was in breach of the first agreement; and (ii) whether there was a conspiracy between the first and second defendants to injure the plaintiff.

Held (dismissing the plaintiff's claim and allowing the 1st defendant's counter claim with costs):

(1) It was the responsibility of the plaintiff under the first agreement to carry out the development. However, instead of developing Lot 2450, the plaintiff gave Parcels A, B and C to DASB under the second agreement. It was also a stipulation in the first agreement that the plaintiff was to build a college for the first defendant on Parcel F. However the plaintiff never built the college for the first defendant. In fact, the plaintiff and DASB were planning not to build the college on Parcel F at all. The plaintiff also failed to fulfil its obligation to lay out the

water, telephone and electricity connection for the Development. In fact, the plaintiff never carried out any development on Lot 2450 at all. The plaintiff never had the ability nor resources to carry out the development of Lot 2450. The plaintiff had disabled itself from fulfilling the terms of the first agreement. This amounted to repudiation of the first agreement by the plaintiff itself. (paras 24, 25, 31, 35 & 37)

(2) The plaintiff had also made it impossible and/or put it out of its power to develop Parcel C when it terminated the second agreement and prevented the second defendant from completing the development while the plaintiff did not have the necessary license to do the work. The second defendant had a license for the specific condominium project. Neither the plaintiff nor the first defendant had the developer's license for the condominium project (or any project). Hence, the first issue was answered in the negative. (paras 39, 42 & 53)

(3) The entering into the fourth agreement was the reasonable and justifiable solution to the dispute, looking at the situation then. When the plaintiff did not resolve the problem with the second defendant, it was justified for the first defendant to terminate the first agreement and enter into the fourth agreement to protect itself from losing Parcel C to MBf and from being sued by the purchasers for non-completion of the project. (para 64)

(4) Since the first defendant acted with the sole or predominant purpose of protecting itself and there was no evidence that the first and second defendants combined and did an unlawful act to cause loss to the plaintiff, conspiracy was not established. Injury is a necessary element of conspiracy. No evidence whatsoever was led by the plaintiff to establish the profit the plaintiff stood to gain if the development of Lot 2450 was seen through to conclusion. (paras 65 & 66)

(5) The first, second and third agreements had been validly terminated. There was no question of unlawful interference by the second defendant. The fourth agreement was in the circumstances justified and necessary, the plea of wrongful interference with intent to injure failed. (para 67)

Case(s) referred to:

Alghussein Establishment v. Eton College [1991] 1 All ER 267 ***(refd)***

Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 1 LNS 48 FC ***(refd)***

Chin Kim & Anor v. Loh Boon Siew [1969] 1 LNS 27 FC ***(refd)***

Crofter Hand Wiven Harris Tweed Co Ltd & Others v. Veith and Another [1942] 1 All ER 146 ***(refd)***

Daiman Development Sdn Bhd v. Mathew Lui Chin Teck and Another Appeal [1978] 1 LNS 42 FC ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***

Golden Vale Gold Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

GS Gill Sdn Bhd v. Descente, Ltd and Another Appeal [2008] 6 MLJ 181 ***(refd)***

Kim Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 FC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

Lonrho Plc v. Fayed and Others [1991] 3 All ER 303 ***(refd)***

Poh Geok Sing v. HB Enterprise Sdn Bhd [2006] 1 CLJ 765 CA ***(refd)***

Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman [2009] 1 MLJ 580 ***(refd)***

Tan Kah Khiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 40

Evidence Act 1950, s. 114(g)

Housing Development (Licensing and Control) Act 1966, ss. 3, 5

For the plaintiff - Vasanthi (Lim Yin Yin with him); M/s Shafee & Co

For the 1st defendant - Ahmad Moosdeen (Paramjothi with him); M/s Chan, Moosdeen & Partners

For the 2nd defendant - Sri Kumar (Intan Azlina with him); M/s Kumar Partnership

Reported by Amutha Suppayah

JUDGMENT

Zaleha Yusof JC:

Preliminary

[1] The trial of this suit was spread over a period of four years. It started on 7 December 2005 and ended on 15 October 2009 and the actual span was ten days. The learned counsels for all parties

involved had agreed on 27 April 2009 and 9 October 2009 that all documents tendered by way of the bundle of documents be treated as agreed bundle of documents, subject to cross examination where necessary.

[2] During the trial, four witnesses were called. Out of four, the plaintiff called two witnesses - the main witness, Encik Yusof bin Abu Othman (the Executive Chairman of the plaintiff) ("PW1") who gave a written examination-in-chief statement dated 6 December 2005 which is marked "G"; and Encik Hamdan bin Mohamad Esa (whose company, Total Project Solution Consultants Sdn Bhd, was the technical advisor and project manager for the plaintiff) who gave a written examination-in-chief statement dated 21 May 2009 which is marked "L".

[3] The 1st defendant called one witness - Haji Takril bin Tasuki (the general manager of the 1st defendant) ("DW1") who gave a written examination-in-chief statement dated 9 October 2009 which is marked "M".

[4] The 2nd defendant also called one witness - Mr. Hwang Thiam Hwa (the Financial Controller of the 2nd defendant) ("DW2") who gave a written examination-in-chief statement dated 12 October 2009 and is marked "N".

The Subject Matter Of Dispute

[5] The subject matter of the dispute here is known as "parcel C", contained on a piece of land known as Lot 2450, Mukim of Damansara, District of Petaling Selangor ("Lot 2450"). Lot 2450 was alienated by the Selangor State Government to the 1st defendant in 1993 for development.

[6] Lot 2450 was divided into six parcels - Parcels A, B, C, D, E and F. The first five parcels were approved for mixed industrial, commercial and residential development but Parcel F was approved for the building of a college. The land office's approval for the aforesaid development is shown in a letter dated 8 November 1996 at p. 90 of Bundle C. As I have mentioned earlier, the subject matter of the dispute here is Parcel C.

The Undisputed Facts

[7] The 1st defendant is the registered owner of Lot 2450 as shown in exh. D.

[8] On 7 March 1995, the 1st defendant entered into a joint venture agreement with the plaintiff to develop the said Lot 2450 ("the 1st agreement"). The terms of the 1st agreement as can be seen at tab 1 exh. 'C', *inter alia*, included the following:

(a) That the plaintiff would develop Lot 2450 into a mixed development comprising apartments, shop houses/offices and condominium ("the development");

(b) That the plaintiff was to construct a college valued at RM26 million on Parcel F covering an area of 10 acres ("the college");

(c) That the plaintiff would pay a sum of RM18 million to the 1st defendant subject to the cash flow position of the development in accordance with the schedule of payment;

(d) That the plaintiff shall be entitled to transfer all or part of Lot 2450 into its own name upon delivery of the college and payment of the RM18 million or guarantees furnished for the same or any balance remaining and a further payment of 20% of the net profit on completion of the whole development and after closing the accounts of the development to a maximum of RM10 million to the 1st defendant;

[9] On 7 September 1995 pursuant to the 1st agreement, the 1st defendant granted an irrevocable Power of Attorney (PA) in favour of the plaintiff as shown at Tab 3 of exh. C.

[10] Later on 1 November 1996, the plaintiff entered into an agreement with Double Acres Sdn Bhd (DASB) appointed DASB as contractor to carry out the development ("the 2nd agreement"). This 2nd agreement is shown at Tab 4 of exh. C.

[11] Subsequently, by an agreement dated 10 April 1997 and a supplemental agreement dated 27 November 1998 ("the 3rd agreements"), DASB entered into a joint venture with the 2nd defendant to develop Parcel C of Lot 2450 ("Parcel C"). The development on Parcel C included five blocks of condominiums known as Puncak Seri" Kelana Condominium ("the project"). All the necessary approvals for the project were executed by the plaintiff using the PA granted by the 1st defendant. These 3rd agreements are shown at Tab 5 and Tab 9 of exh. C.

[12] Pursuant to the 3rd agreements, the 2nd defendant obtained a credit facility from MBF Finance for the sum of RM68 million ("the MBF loan") which was securitized, *inter alia*, by an assignment (subsequently converted into a 3rd party charge upon issuance of the issue document of title) over Parcel C. The assignment is shown at pp. 1 to 9 of exh. K; and the 3rd party charge at pp. 10 to 24 of exh. K.

[13] In early 1999, a dispute arose between the plaintiff, DASB and the 2nd defendant with regard to the MBF loan which resulted in the termination of the 2nd agreement on 26 January 1999 given certain breaches by DASB.

[14] Thereafter, a discussion was held on 15 February 1999 between the 1st defendant, the plaintiff and the 2nd defendant to discuss and resolve the problems surrounding the development of Parcel C of Lot 2450.

[15] On 25 February 1999, the 3rd agreements between the 2nd defendant and DASB were terminated by the 2nd defendant.

[16] On 2 March 1999, the plaintiff went into discussions with the 2nd defendant with regard to a proposed joint venture agreement between the plaintiff, the 1st and 2nd defendants. Parties exchanged comments and amendments to the draft JV agreement dated 25 February 1999 with a view to formalizing it.

[17] On 27 March 1999, the 1st defendant forwarded a draft supplementary JV agreement to the plaintiff which envisaged the plaintiff surrendering Parcel C of Lot 2450 to the 1st defendant. Further, it envisaged that upon the agreement and consent of the plaintiff, the 1st defendant would enter into an agreement with the 2nd defendant to develop Parcel C of Lot 2450. The plaintiff declined to enter into the said agreement as the terms were inconsistent with the 1st agreement.

[18] By a letter dated 19 April 1999, the 1st defendant terminated the 1st agreement for 16 alleged breaches committed by the plaintiff and issued deed of revocation of the PA dated 20 April 1999.

[19] By an agreement dated 20 April 1999, the 1st defendant entered into a joint venture agreement with the 2nd defendant to develop Parcel C of Lot 2450 ("the 4th agreement"). The 4th agreement can be seen at Tab 2 of exh. B.

A **The Plaintiff's Claim**

[20] The plaintiff's claim can be briefly summarized as follows:

(a) That the 1st defendant had wrongfully terminated the 1st agreement and then conspired with the 2nd defendant to injure the plaintiff when the 1st and 2nd defendants entered into the 4th agreement.

(b) That the 2nd defendant had wrongfully induced the 1st defendant to breach its agreement with the plaintiff.

(c) That the court grants the following reliefs - a declaration that the agreement between the plaintiff and 1st defendant is still valid and for specific performance of the same, an account of monies received by the 1st defendant, damages, interest and costs.

The 1st Defendant's Defence And Counter Claim

[21] The 1st defendant's defence according to its amended defence and counter claim can be summarized as follows:

(a) That the 1st defendant was entitled to terminate the 1st agreement for breach of the terms and repudiation by the plaintiff.

(b) That the plaintiff, the wrongdoer, will not be allowed to benefit from its own wrongdoings,

(c) That the 1st defendant was entitled to enter into its agreement with the 2nd defendant as a matter of right and to protect itself against the problem created by the plaintiff.

(d) That the plaintiff returns the 1st defendant's four land titles held by plaintiff, and the 1st defendant also counter claims for damages for breach of contract and costs.

The 2nd Defendant's Defence

[22] The 2nd defendant's defence can be summarized as follows:

(a) That all allegations of fraud, conspiracy, collusion, unlawful interference and inducement to breach and any intent to injure the plaintiff are denied and the plaintiff is put to proof thereof;

(b) That upon termination of the 2nd agreement by the plaintiff, performance of the 3rd agreements were rendered impossible as the same are based on and predicated upon the performance of the plaintiff's and DASB's obligations under the 2nd agreement;

(c) That the 4th agreement was entered into between the 1st and 2nd defendants after the 1st agreement had been lawfully terminated by the 1st defendant. That the 4th agreement was entered into out of necessity given the fact that the project was in jeopardy and had exposed Parcel C to foreclosure as a result of the charge. And more importantly, the interests of purchasers were likewise threatened. That the 4th agreement was the only reasonable and practical solution as the 2nd defendant was the only party licensed to undertake the project.

(d) That the 1st defendant was justified in terminating the 1st agreement following the plaintiff's termination of the 2nd agreement and the fact that the plaintiff had done nothing to develop Lot 2450 pursuant to the terms of the 1st agreement.

(e) That as a result of the termination of the 2nd agreement on 26 January 1999, the 3rd agreements on 25 February 1999 and the 1st agreement on 19 April 1999, the 1st and 2nd defendants were at liberty to enter into the 4th agreement to the exclusion of the plaintiff.

(f) That the plaintiff ought not to be permitted to benefit or take advantage of its wrongdoing and/or default.

Issues

[23] After scrutinizing the evidence and the facts before me, I come to the conclusion that there are basically two main issues in this matter:

(a) Whether the 1st defendant was in breach of the 1st agreement.

(b) Whether there was a conspiracy between the 1st and 2nd defendants to injure the plaintiff.

Issue 1

Whether The 1st Defendant Was In Breach Of The 1st Agreement

[24] Under the 1st agreement as stated in the paragraph entitled "undisputed facts" aforementioned, the responsibilities of the plaintiff were specified. It was the responsibility of the plaintiff

under the 1st agreement to carry out the development. However, evidence was led that instead of developing Lot 2450, the plaintiff gave Parcels A, B and C to DASB under the 2nd agreement. During cross-examination of PW1, he had said as follows:

> Mah: [Witness referred to page 48 Ikatan C]
>
> [A] I agree that under this 2nd Agreement plaintiff agrees to give to Double Acres Parcel A, B, C upon certain conditions ie, completion of work
>
> I confirm this is found in clause 2 of Agreement.
>
> Mah: [Witness referred to page 50 and 53 Ikatan C]
>
> [A] I confirm contractor lots mean lots A, B and C. I agree upon completion of works plaintiff will only retain lots D, E and F. ...

[25] It was also a stipulation in the 1st agreement that the plaintiff was to build a college for the 1st defendant on Parcel F. However the plaintiff never built the college for the 1st defendant. In fact, from the minutes of the project management meetings between the plaintiff and its contractor, DASB, they were planning not to build the college on Parcel F at all. On the minutes of the eight project management meeting attended by the plaintiff and DASB (but not the 1st defendant) at Bundle J tab 26, PW1 was asked in cross examination and said the following:

> Q: ... Can you confirm by item (iv) it was resolved that plaintiff would source new site other than the land to build the college.
>
> A: Yes, I confirm.
>
> Q: ... Can you inform college meant to be built on Block F?
>
> A: Yes.

PW1 also said as follows:

> [A] I confirm up to this stage plaintiff did not inform 1st defendant that they are seeking alternative site for the college.
>
> [A] ... I confirm up till today college not built on parcel 'F'.

[26] However, the learned counsel for the plaintiff in her submission has stated that the reason why the college was not built at the time the JV was terminated was because the plaintiff still had 30 months from the approval of the building plans to build the college. She relies on her re-examination of PW1 as follows:

Q: Looking at cl. 8.01, on 19 April 1999, the 30 months had not expired for the approval of the building plans?

A: Yes.

[27] Clause 8.1 of the 1st agreement requires the plaintiff to deliver to Yayasan a completed college within 30 months from the date of approval of the relevant building plans. It also requires the plaintiff to pay RM18 million to Yayasan according to the schedule of payment, *inter alia*, RM1 million within three months from obtaining the approved layout plan.

[28] Therefore, in my opinion, before the plaintiff could rely on the 30 months period and the said cl. 8.1, the plaintiff must first show when it had submitted the building plan. During cross-examination on 28 September 2006, PW1 merely said this:

A: We did submit building plans for 1st phase. I cannot recall whether it was submitted within six months. I have documentary proof that building plans was submitted. I have to find it. Building plain in question was in relation to Parcel C, which would be 1st phase of development. I cannot recall who prepared building plans. All plans were prepared by professionals.

[29] PW1 had also said this in his evidence:

A: ... No plaintiff did not build college for the 1st defendant between the signing of 1st JV agreement and its termination on 19 April 1999. No, plaintiff did not pay the 1st defendant RM18 million or part thereof during said period. No the plaintiff did not pay the 1st defendant 20% net profit subject to RM10 million during said period.

From the said evidence of PW1, I also find that the plaintiff never paid the 1st defendant any part of the RM18 million nor gave the 1st defendant 20% of any net profit since the plaintiff never carried out any development on Lot 2450 in the first place.

[30] If what PW1 said is true, that PW1 had submitted the building plan, then the plaintiff must have received the approval of the layout plan as the building plan could only be submitted after the approval of the lay out plan. As such, cl. 8.01 requires the plaintiff to pay RM1 million within three months from obtaining the approved lay out plan. However, I find there is no proof of such payment and I am of the opinion that the plaintiff's submission that the plaintiff had not yet paid any part of the cash allocation as the JV clearly provided the cash allocation was to be paid only once the college was built is clearly, with respect, misconceived.

[31] According to cl. 5.01.17 of the 1st agreement, it was also the plaintiff's obligation to lay out the water, telephone and electricity connection for the development. However, the plaintiff itself through PW1, had admitted that this obligation had not been fulfilled. The following is what PW1 had stated in his evidence:

> A: ... I confirm cl. 5.01.17 is the plaintiff's obligation (to lay out the water, telephone and electricity connections). Up to point of termination plaintiff has not complied with obligation. I confirm plaintiff's obligation to ensure development from date of commence to date of completion under cl. 10.01 (p. 25). I confirm plaintiff's obligation to ensure development under cl. 10.02. Plaintiff has not complied with this obligation.

[32] In fact, I would say that from the evidence, the plaintiff never carried out any development on Lot 2450 at all. Cross-examination of PW1 reveals the following:

> Q: Aside from (geotechnical) study, did the plaintiff do anything else on the land apart from entering into 2nd agreement with double acres.
>
> A: No we relied on double acres to carry out the work and expert to carry out the study.

[33] If the plaintiff was relying on DASB to carry out the work as said by PW1 in his evidence, did DASB carry out the work? I find the answer is no as at p. 33 of the notes of evidence PW1 also said, "up to date of termination by plaintiff (of the 2nd agreement), double acres has not started any work at all."

[34] PW1 in his evidence also said the following: A

A: ... I confirm under 1st JV agreement plaintiff has a duty to complete development without unreasonable delay. I confirm this obligation found in cl. 5.01.10 of 1st JV agreement. I confirm that until date 1st JV agreement terminated in 1999, only development on the land was on Parcel C. B

Q: This development carried out by 2nd defendant?

A: Yes it was carried out by 2nd defendant. ... C

[35] In fact, looking at the whole evidence it also shows that the plaintiff never had the ability nor resources to carry out the development of Lot 2450. PW1 in his evidence had said that between 1995-1999, the plaintiff had five employees. The rest of the services were outsourced. The five employees are Head of Admin, Business Development Manager, two general clerks, himself and his father. D

[36] He also gave evidence as follows:

[A] I confirm plaintiff company was incorporated on 13 August 1991. I confirm company had paid up capital of RM 100. E

Q: Refer to p. 107 [Bundle D - company search of plaintiff].

A: I confirm last audited account filed by company was 30 April 1997. I confirm company had unappropriated loss of RM504,524. F

Q: Refer p. 108 profit and loss sheet.

Can you confirm turnover of company zero and operating revenue zero. G

A: Yes because we had not started developing the land.

[37] Looking at the evidence of PW1, it is very clear that the plaintiff had disabled itself from fulfilling the terms of the 1st agreement. In my opinion this would amount to repudiation of the 1st agreement by the plaintiff itself. H

Section 40 of the Contracts Act 1950 states as follows: I

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[38] In *Chin Kim & Anor v. Loh Boon Siew* [1969] 1 LNS 27; [1970] 1 MLJ 197, the Federal Court said in regard to s. 40, if one party wrongly repudiates an agreement, the other party has a choice - to terminate the agreement or continue with the agreement. At p. 198 it said:

> With respect, I think the judgment proceeded upon a misapprehension of what really were the material facts. The vendor refusal of the deposit on June 8, 1962 was coupled with an unequivocal repudiation of the agreement. That left two courses open to the purchaser - either to agree to rescission of the agreement or treat the repudiation as "writ in water". This is clearly laid down in section 40 of the Contracts (Malay States) Ordinance 1950 ...

[39] From the evidence, I also find that the plaintiff had also made it impossible and/or put it out of its power to develop Parcel C when it terminated the 2nd agreement and prevented the 2nd defendant from completing the development while the plaintiff did not have the necessary license to do the work.

[40] It cannot be disputed that the condominium project on Parcel C is a housing development and, therefore, is governed by the Housing Development (Licensing and Control) Act 1966 (HDA) and its regulations. See the definitions of "housing development" in s. 3 of the HDA.

[41] Under s. 5 of the HDA, no developer can carry on a housing development without a license for the specific housing development issued under the HDA. Section 5(1) reads as follows:

> No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a license issued under this Act.

[42] The 2nd defendant had a license for the specific condominium project which is at bundle H p. 2. Neither the plaintiff nor the 1st defendant had the developer's license for the condominium project (or any project). This means only the 2nd defendant (not the plaintiff) had the ability, legally, to carry on and complete the condominium project.

[43] Therefore, after the 2nd agreement was terminated and the condominium project was in jeopardy, it is my view that the only legal and possible solution was to give back the right and obligation

to continue and complete the condominium project to the 2nd defendant, which right was taken away by the plaintiff when it terminated the 2nd agreement.

[44] The plaintiff also knew what a housing development meant and entailed - that developer must have a license to develop the particular project, that the 1st defendant as landowner and the 2nd defendant as developer must sign the sale and purchase agreements and if there is a breach, they (the 1st and 2nd defendant) are liable to the purchaser, not the plaintiff. During cross-examination PW1 had also said the following:

[A] Yes my experience in property development including housing development.

I confirm someone experienced in housing development in Malaysia includes houses and apartments. I am aware that housing development governed by law in Malaysia specifically Housing Development (Licensing and Control) Act 1966. I am aware housing developer must be licensed under the Act to be a developer. I am aware that if the housing developer wishes to sell apartments as in this case sale and purchase agreement must be in statutory format. I am aware format found in Housing Development (Control and Licensing) Regulations 1989. I am aware three parties must sign the licensed developer, and the land owner if developer is not the owner and purchaser. I confirm for housing development in Parcel C, the owner is 1st defendant and the licensed developer is 2nd defendant. I agree plaintiff neither licensed developer nor land owner. I agree in sale and purchase agreement of Parcel C, 1st defendant signs as land owner and 2nd defendant signs as licensed developer. Yes plaintiff can sign *vide* P/A for 1st defendant.

Q: If there is breach of sale and purchase agreement with purchaser will plaintiff be liable under the agreement?

A: I don't know.

I confirm plaintiff not a part to agreement. I agree that if there is a breach of agreement, plaintiff will not be liable because plaintiff not party to agreement.

A Q: [It] therefore follows only 1st defendant as landowner and 2nd defendant as licensed developer will be liable under the agreement?

A: Yes.

B **[45]** On 11 June 1997, MBF Finance Bhd (MBf) gave the MBf loan to the 2nd defendant to finance the development of the condominium project. Parcel C was given to MBf as a security for the MBf loan, first by way of assignment, then replaced by a charge when the title for Parcel C was issued. Based on the PA, the C assignment of the charge was executed by the plaintiff. This was confirmed by PW1 in his evidence as follows:

[A] I confirm this is Deed of Assignment dated 25.8.1997 between MBF Finance and the 1st defendant. I confirm this assignment D was signed by plaintiff on behalf of 1st defendant. I confirm the director signing it on behalf of plaintiff is myself.

Yes purpose of assignment to give Parcel C to MBF Finance as security for loan.

E Q: Can you confirm the borrower is actually 2nd defendant. Refer page 3.

A: Yes.

Q: How much was loan for?

F

A: RM 6.8 million to be given to 2nd defendant.

(Typographical error. Loan was for RM68 million. See bundle K page 10.)

G Yes, purpose of loan is for 2nd defendant to develop Parcel C.

…

[A] Yes following from this assignment, charge over this land was given to MBF Finance.

H Q: Refer to page 10 and 11.

A: I confirm charge was signed by plaintiff on behalf of registered owner of the land. I confirm officer who signed at page 11 on behalf of 1st defendant is myself.

I

[46] The plaintiff also knew that the MBf loan was to be repaid from the sales of the units in the condominium project and that if the MBf loan was not repaid, MBf could sell Parcel C by the charge which was signed by the plaintiff as attorney of the 1st defendant and purchasers would not get their apartment. In his evidence, PW1 said as follows:

[A] ... Yes purpose of loan is for 2nd defendant to develop Parcel C.

...

Q: Can you confirm that loan from MBF Finance was to be repaid from sales of apartment in Parcel C.

A: I did not find out the mechanism. Loan would be paid by 2nd defendant. I don't know. I did find out cannot recall. I don't know.

Q: Does it mean you sign document giving away your land without knowing how it is going to be paid.

A: I didn't say that.

Q: In this particular case, did you find out how loan is to be repaid?

A: From the project. Yes I confirm loan would be repaid from sales of apartment in Parcel C.

Q: As experienced housing developer if loan is not repaid, by those two documents (assignment and charge) MBF can sell Parcel C to recover the loan.

A: Yes.

Q: If loan not repaid and MBF sell of Parcel C, apartment 3 cannot be sold to purchasers, if sold cannot be delivered.

A: Yes.

Q: Under the assignment and charge party who will lose the land is registered owner ie, 1st defendant not plaintiff.

A: Yes.

Knowing all of the above (the consequences if the condominium project was not completed), the plaintiff nevertheless deliberately terminated the 2nd agreement, told the 2nd defendant to stop work on the condominium project (bundle C p. 149), deliberately wrote to MBf to inform MBf of the termination, the obvious effect of which was MBf wrote to the 2nd defendant threatening to recall the MBf loan as shown in bundle B p. 39. PW1 in his evidence had said as follows:

[A] I confirm plaintiff terminated CA [the 2nd Agreement] with Double Acres on 26 January 1999.

Q: Following from the termination can you confirm that plaintiff wrote to MBF informing them that C.A. has been terminated.

Mah: [Witness referred to p. 39 Ikatan B]

A: Yes this letter confirms that plaintiff informed MBF that plaintiff has terminated CA with double acres. I do not recall exhibit letter of 25 March 1999. I confirm plaintiff did write to MBF Finance. Purpose of informing MBF, to keep them posted on development. It is possible that MBF will recall the loan.

Q: Do you agree that as experienced housing developer, possibility that MBF will recall loan.

A: Agree.

...

[A] ... I agree when CA terminated with Double Acres, 2nd defendant has no more right to be on the land.

[47] Looking at the evidence of PW1, I have no doubt in coming to a conclusion that the plaintiff has committed an anticipatory breach of the 1st agreement as with all the above knowledge, the plaintiff would have known that when the plaintiff terminated the 2nd agreement if no action was to be taken by the 1st defendant as the landowner, it was only a matter of time that the 1st defendant, the landowner, would lose Parcel C if MBf were to sell it to recover the MBf loan. And this would and could trigger the purchasers to sue the 1st defendant for breach of contract.

[48] In my opinion, by recklessly terminating the 2nd agreement and stopping the condominium project, the plaintiff committed an anticipatory breach of his duty to the 1st defendant to comply, *inter*

alia, with cls. 4.01 (to develop), 5.01.2 (to comply with the laws including the HAD) and 5.01.10 (to develop without unreasonable delay) of the first agreement because it was an inevitable and foreseeable consequence and only a matter of time that Parcel C would be sold by MBf and that the purchasers would be suing the plaintiff for breach of contract.

[49] The learned counsel for the plaintiff has submitted that the 1st defendant has failed to show that the purchasers would have sued for non-completion where the sale and purchase agreement had not been executed properly by both parties. However with due respect, I find this submission is without merit. In *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck and Another Appeal* [1978] 1 LNS 42; [1978] 2 MLJ 239, after the purchaser had signed the booking proforma and paid the booking fee (but before the parties signed the sale and purchase agreement), the developer decided to increase the purchase price. The purchaser objected and sued for specific performance based on the booking proforma. The developer said that since the sale and purchase agreement was not signed yet, it could increase the price and if the purchaser did not agree, the developer would refund the booking fee. Both the High Court and the Federal Court allowed the purchaser's claim. The Federal Court said at p. 243 as follows:

> The issue was whether the booking pro forma was a mere agreement to agree, as the defendants contended, or a firm contract of sale of the property, as the plaintiff contended. In our judgment, the pro forma was a firm contract. It identified the parties, it specified the property to be bought and its price. True, the plaintiff was required to sign an agreement of sale to be prepared by the developers' solicitors and subject to the terms and conditions therein; but in fact the developers never showed the plaintiff the draft of any agreement. All the developers did was to announce unilaterally an increase in price for reasons which could not, in our view, affect the price to be paid by the plaintiff. The developers are bound by the Housing Developers (Control and Licensing) Rules, 1970, published as P.U.(A) 268 of 1970 and only details may be inserted into the further agreement.

[50] The Federal Court's decision was affirmed by the Privy Council in [1981] 1 MLJ 57.

[51] In *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 1 LNS 48; [1982] 2 MLJ 222 the facts were similar to the *Daiman Development* case with an addition. The purchaser had also signed the booking proforma and paid the booking fee and the sale and purchase agreement was not signed yet, when the developer decided to increase the purchase price. When the purchaser did not agree to the increase, the developer refunded the booking fee which the purchaser accepted and then sued for damages for wrongful repudiation. The developer said *inter alia* that by accepting the refund, the purchaser had waived the developer's duty to perform, if there was an agreement in the first place. Both the High Court and the Federal Court allowed the purchaser's claim. The Federal Court said there was a contract based on the booking proforma and when the developer increased the purchase price, it repudiated the contract. When the purchaser accepted the refund, he was accepting the repudiation and terminating the contract. The purchaser could then sue for damages for wrongful repudiation. At p. 226, the Federal Court said as follows:

> The facts in this case are almost the same as those in *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56 PC but the issue in this appeal is different from that in that case. In *Daiman Development*'s case, the main issue was whether the booking proforma constituted a binding contract, whereas in the present appeal that question is no longer an issue, since both the Federal Court and the Privy Council in Daiman Development's case answered it in the affirmative.

[52] In *Kim Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 after the purchasers had booked their houses but before they signed the sale and purchase agreements, the developer decided not to build because the local authority's approval of the development was subject to conditions which were not acceptable to the developer. The purchasers sued for breach of contract and the developer put up the defence of frustration. Both the High Court and Federal Court allowed the purchasers' claim and at p. 184, the Federal Court said as follows:

> Before us counsel for the appellant did not raise the issue as to whether acceptance of the booking constituted a binding contract between the appellant and the purchasers. We think that it is very proper for him to omit it as the ruling of the learned trial judge on this issue is unassailable. (*Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor*).

[53] Based on the above it is my considered opinion that it was the plaintiff who had committed breach of its obligation. Hence, my answer to the first issue is in the negative.

Issue 2

Whether There Was A Conspiracy Between The 1st And 2nd Defendant To Injure The Plaintiff

[54] What is conspiracy has been explained in details by the House of Lords in *Lonrho Plc v. Fayed and Others* [1991] 3 All ER 303. In this case, the House of Lords affirmed that there are two types of conspiracies:

(a) A and B combine to do an lawful act for an unlawful purpose which causes loss to a third party, C; and

(b) A and B combine to do an unlawful act which causes loss to C.

[55] At p. 307 of the case, Lord Bridge said:

> In *Rookes v. Barnard* [1964] 1 All ER 367 at 297 .. Lord Devlin said:
>
> > There are, as is well known, two sorts of conspiracies, the *Quinn v. Leathem* ([1901] AC 495 ...) type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.

[56] For the type (a) conspiracy where the act is lawful, the predominant purpose must be to cause loss to C for there to be conspiracy. If the predominant purpose is for the self interest or protection of A and B, this is not an unlawful purpose and there is no conspiracy, even if C incidentally suffers loss.

[57] On the type (a) conspiracy, Lord Bridge further said at p. 309:

> In *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] AC 435 at 445 ... [another House of Lords' decision] Viscount Simon LC said:
>
> > It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another person and damages results, that is tortious

A conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortuous conspiracy, even though it cause damage to another person.

B **[58]** For the type (b) conspiracy where the act is unlawful, it does not matter what the predominant purpose is. If A and B combine to use an unlawful act which causes loss to C, there is conspiracy.

On the type (b) conspiracy, Lord Bridge said at p. 309 as follows:

C

> But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortuous that the means used were unlawful.

D **[59]** See also *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695 and *Crofter Hand Wiven Harris Tweed Co Ltd & Others v. Veith and Another* [1942] 1 All ER 146.

[60] The plaintiff alleged that the conspiracy occurred the moment
E the 1st defendant and the 2nd defendant agreed in letters of 8 March 1999 and 21 March 1999 to enter into the 4th agreement. The plaintiff contended that the plaintiff was under the impression that all parties were going to be involved in the proposed JV between the plaintiff, the 1st defendant and the 2nd defendant as it
F was privy to some meetings between the parties and also it had been provided with the Supplementary JV Agreement for vetting. The termination of the 1st agreement and the subsequent entry of the 4th agreement between the 1st defendant and the 2nd defendant a day after the termination of the plaintiff to the 1st agreement was
G according to the plaintiff clearly an act designed to injure the plaintiff and cause damage.

[61] The 1st and the 2nd defendants denied that they conspired to harm the plaintiff and submitted that the plaintiff had failed to
H adduce any evidence to prove conspiracy between the 1st and 2nd defendants.

[62] Here again, I find the evidence of PW1 very important. PW1 never testified to the effect that the 1st and 2nd defendant had a common design to do wrong to the plaintiff and that the
I predominant purpose of the 4th agreement was to injure the

plaintiff. There was also a failure on the part of the plaintiff to cross examine DW2 and put to DW2 that there was such an intention, the predominant purpose of which was to injure the plaintiff. What is even more telling is the admission by PW1 that the plaintiff has no evidence whatsoever to prove the alleged conspiracy between the 1st and 2nd defendants. The only point made by PW1 was that the 4th agreement was entered into immediately after termination of the 1st agreement thereby suggesting that there must have been some form of conspiracy. Having said that, PW1 thereafter admitted that the alleged conspiracy between the 1st and 2nd defendants was only an allegation and that the plaintiff did not have any evidence.

[63] PW1 admitted in cross examination that the whole chain of events started with the plaintiff's termination of the 2nd agreement with DASB. It is to be noted that it is part and parcel of the plaintiff's case that the 2nd agreement had been validly and properly terminated by the plaintiff. It is also part of the plaintiff's case that the 3rd agreements are predicated on the 2nd agreement between the plaintiff and DASB. Accepting these premises, it is not wrong for me to conclude that the plaintiff must be taken to have rendered performance of the 3rd agreements impossible hence leading to termination for those reasons by the 2nd defendant. It is also useful to note that it was never suggested by the plaintiff that the termination of the 3rd agreements by the 2nd defendant was unlawful or improper. DW2 has testified that to ensure that the project was not jeopardized by reason of the MBf loan and also the need to protect the interest of members of the public who had purchased individual units in the project; the 4th agreement was entered.

[64] I agree that the entering into the 4th agreement is the reasonable and justifiable solution to the dispute, looking at the situation then. As stated earlier, neither the plaintiff nor the 1st defendant had the developer's license. When the plaintiff did not resolve the problem with the 2nd defendant, I feel it was justified for the 1st defendant to terminate the 1st agreement and enter into the 4th agreement to protect itself from losing Parcel C to MBf and from being sued by the purchasers for non-completion of the project.

[65] Since the 1st defendant acted with the sole or predominant purpose of protecting itself (and not of causing loss to the plaintiff), there is no type (a) conspiracy as envisaged by *Lonrho*'s case (*supra*) here, even if the plaintiff was incidentally affected by it. There is also no type (b) conspiracy as explained by *Lonrho*'s case as on the type (b) conspiracy, the plaintiff must prove that the 1st and 2nd defendants combined and did an unlawful act to cause loss to the plaintiff. There is no evidence of any unlawful act.

[66] It must be borne in mind that injury is a necessary element of conspiracy. In the present case, PW1 has admitted that it never paid any part of the RM4.3 million related to premiums and other charges for Lot 2450, that it did not fund or finance the development of the project and that the plaintiff did not furnish any security for the MBf Loan. PW1 also agreed that the funding for the project was obtained by the 2nd defendant from MBf. As I have earlier concluded that the termination was brought about by the plaintiff's own conduct, no question can arise as to the damage and/or injury. Even if there is such question, failure to prove actual damage is fatal to a claim for conspiracy. In this instance, no evidence whatsoever was led by the plaintiff to establish the profit the plaintiff stood to gain if the development of Lot 2450 was seen through to conclusion. Such evidence could have been secured by the plaintiff, *inter alia*, through DW1 and DW2. There was however absolutely no attempt by the plaintiff to solicit any such evidence from any witness. In those circumstances, I find, the plaintiff has likewise failed to satisfy this essential element of the tort of conspiracy.

[67] Other Issues

(1) Inducement and Unlawful Interference

As I have said before, the 1st, 2nd and 3rd agreements had been validly terminated. Thus, there is no question of unlawful interference by the 2nd defendant. See the decision of the Federal Court in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 on the tort of inducement of breach of contract. As I also have concluded that the 4th agreement was in the circumstances justified and necessary, the plea of wrongful interference with intent to injure must likewise fail.

(ii) Can the plaintiff be permitted to take advantage of its own wrong?

(a) It has been shown that the dispute started with the termination of the 2nd agreement by the plaintiff. It has been shown that based on the plaintiff's own breaching, the 1st defendant was entitled to terminate the 1st agreement. In *Alghussein Establishment v. Eton College* [1991] 1 All ER 267, the tenant tried to take advantage of badly draft terms of the tenancy agreement which allowed the tenant in breach to claim for an extension of the tenancy but the tenant's claim was dismissed by the High Court, the Court of Appeal and the House of Lords, all on the same principle. Lord Jauncey in the House of Lords said at p. 270 that "it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party."

(b) This decision was quoted by the Court of Appeal in *Poh Geok Sing v. HB Enterprise Sdn Bhd* [2006] 1 CLJ 765; *Golden Vale Gold Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 and *Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman* [2009] 1 MLJ 580.

(c) In the instance, as the default was clearly on the plaintiff, following the abovementioned authorities, I am of the opinion that it would be against principle and policy of the law if the court were to allow the plaintiff to take advantage of its own wrong. As such, the plaintiff, itself being a contract breaker who started the whole dispute, must not be permitted to take advantage of its own wrong as against the defendants.

The 1st Defendant's Counter Claim

[68] In its counter claim, the 1st defendant applies for a declaration that the 1st agreement is terminated and damages to be assessed plus for an order that the plaintiff return the original titles of Parcels B, D, E and F to the 1st defendant forthwith.

[69] As stated earlier, I have found that the 1st agreement had been validly terminated. PW1 during cross-examination had admitted that the original titles of Parcels B, D, E and F are with the plaintiff.

[70] The learned counsel for the plaintiff has submitted that the evidence of the 1st defendant's witness, DW1, who is the present General Manager (GM) of the 1st defendant, was not reliable and without details. She also has submitted that the failure of the 1st defendant to call the former GM draws an adverse inference against the 1st defendant and therefore invokes s. 114(g) of the Evidence Act 1950.

[71] I have to admit that I agree with the learned counsel for the plaintiff that the evidence of DW1 is not satisfactory in the sense that he did not seem to know many details. However, I am satisfied that there is other evidence especially from the plaintiff's own witness which can support the 1st defendant's counter claim. In *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715, the Court of Appeal said in p. 722 as follows:

> But, entirely to the credit of the plaintiff's counsel, he managed, during cross examination to obtain an admission from the defendants' witness that the plaintiff had asked for "tea money". That in my view was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true.

[72] In another Court of Appeal's decision, in *GS Gill Sdn Bhd v. Descente, Ltd and Another Appeal* [2008] 6 MLJ 181 at para. 10 the Court of Appeal said as follows:

> Now, it is axiomatic that in civil litigation a party is bound by the evidence of the witnesses he chooses to call. If the evidence of his witness is adverse to his case then his opponent is entitled to rely on that evidence in support of his own case. This is encapsulated in the phrase: Their evidence is our evidence.

[73] Based on these two decisions, it is clear that the plaintiff's evidence is also the defendant's evidence as the defendant's counsel has managed to obtain evidence to support the defendant's counter claim during the cross examination of the plaintiff's witness. As such I am of the opinion that the 1st defendant in this instance may rely on the plaintiff's evidence to prove its counter claim.

Conclusion

[74] For the reasons already given, I dismiss the plaintiff's claim against both the defendants with costs and allow the 1st defendant's counter claim also with costs. The learned counsels for the defendants have suggested the costs of RM80,000 for each defendant and RM10,000 for the counter claim. The learned counsel for the plaintiff has said that she asks for normal costs but leave it to the court. Looking at the complexity of the case, and the fact that it has taken years to complete, I agree with the costs as suggested by the learned counsels for the defendants; ie, costs of RM80,000 for each defendant and RM10,000 for the 1st defendant in respect of the counter claim.